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Brian A. Googins

James A. Greene

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The Industrial Targeting Practices of Japan and the Domestic Machine Tool Industry*

by Brian A. Googins†

and

James A. Greene††

I. INTRODUCTION

The substantial decline in output, profits and employment in the U.S. machine tool industry during a period marked both by a major economic recession and by a substantial increase in imports affecting the entire range of machine tools has focused intense interest on U.S.-Japanese trade relations and the legal and political remedies available for addressing the domestic dislocation caused by competition from imports. This article will examine the current state of U.S.-Japanese trade relations as it relates to the attempts by the domestic machine tool industry to compete with increased Japanese imports.

Various relief mechanisms available to the machine tool industry under existing trade laws, many of which are currently being utilized, will be reviewed. In addition, a petition for relief under a previously unutilized section of the Revenue Act of 1971¹ will be examined. The article will review the nature of the argument presented by the petitioner, Houdaille Industries, Inc., alleging that the Japanese government has fostered the development of a cartel to promote its own machine tool industry, and it will examine the statutory authority of the President to provide relief for the machine tool industry. Finally, the article will review the various options available to the United States and its machine tool industry in developing a solution to competition from imports.

* This article represents the position of the authors and does not reflect the policy of the U.S. Department of Labor.

† Deputy Division Chief, Office of Trade Adjustment Assistance, U.S. Department of Labor, Washington, D.C.; B.S., Georgetown University (1963).

†† Office of the Solicitor, U.S. Department of Labor, Washington, D.C.; B.A., Iona College, New York (1970); M.A., New School for Social Research, New York (1973); J.D., New York Law School, New York (1977).

¹ 26 U.S.C. § 48(a)(7)(D) (1976).

II. THE INDUSTRY AND THE THREAT

The U.S. machine tool industry, with shipments of some \$5.68 billion in 1982,² is vital to every area of the U.S. industrial economy, from autos to aerospace to home appliances. The industry is characterized by both a high degree of concentration for the manufacture of the most sophisticated equipment and by a high degree of competition³ with hundreds of small firms located near the industries that they supply, indicating an environment of competition and flexibility. However, the nature of the industry also indicates that most firms in the industry may have trouble adjusting to the latest technological innovations which have begun to transform the machine tool industry. The adaptation of computer technology to the machine tool industry has transformed the industry from merely the producer of simple one or two function machine tools into a producer of sophisticated "computer numerically controlled" (CNC) machining centers. New developments in the industry suggest that tremendous growth will occur in the field of robotics, thereby taking the CNC machine tool to a much higher level of development. Robots will control or direct other machine tools in a whole range of production functions, including sorting parts, assembly and final inspection. The amount of capital that will be required to develop and produce the next generation of CNC machine tools and robots will exceed that available to all but the largest firms.

As the industry is undergoing rapid technological change, imports have become a major force in the domestic machine tool market. Imports of metal cutting and forming machine tools grew from 6.6 percent of domestic shipments in 1972 to 20.2 percent in 1979 and to 28.4 percent in 1982.⁴ In the fastest growing segment of the machine tool industry, CNC machining centers, imports have taken an even larger share of the domestic market—35.5 percent in 1982.⁵ Japan is rapidly becoming the dominant force in the expansion of imports. "In 1976 the Japanese . . . accounted for only 3.7 percent of the U.S. market for NC machining centers. By the first nine months of 1981, this market share had grown to 50.1 percent."⁶ The result has been a series of petitions by the machine

² U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1983, MACHINE TOOLS AND ACCESSORIES 20-1, 20-2.

³ For example, the four largest firms account for 22 percent of metal cutting machine tool shipments and 18 percent of metal forming machine tool shipments. In addition, over 66 percent of firms producing metal cutting machine tools and over 61 percent of firms producing metal forming machine tools employ less than 20 persons. *Id.*

⁴ *Id.* at 20-2, 20-3.

⁵ *Id.* at 20-4.

⁶ Houdaille Industries, Inc., Petition to the President of the United States Through the Office of the United States Trade Representative for the Exercise of Presidential Discretion Authorized by Section 103 of the Revenue Act of 1971, at 2 (May 3, 1982). Imports reflected

tool industry and its individual members requesting various forms of relief from the increased competition from imports.⁷

III. REMEDY—LEGAL AND POLITICAL

Since the end of World War II, the United States has been committed to the development of an open, anti-protectionist world trading system. The goal has been to achieve the rapid growth of international trade and the reconstruction of major industrial economies destroyed during the war. The U.S. economy has, in the aggregate, benefited from free international trade, particularly in such areas as aircraft production and grain exportation; however, in other industries, such as shoe manufacturing and watch manufacturing, international trade has caused severe disruptions. As a result, the Congress of the United States has established various relief mechanisms to provide remedies for injuries which result from imports. For the purpose of explication, these mechanisms can be divided into two broad categories: (1) those that provide relief from injury resulting from specific acts of foreign entities;⁸ and (2) those that provide relief from injury which results from the volume of imports, where such injury is serious⁹ or where the nature of the injury is serious per se, as in cases where imports threaten to impair the national security.¹⁰

The current state of the domestic machine tool industry, classified as "severely depressed" by the National Machine Tool Builders Association, is characterized by an 84 percent decline in net new orders from the first quarter of 1979 to the last quarter of 1982, employment declines of production workers by over 41,000 from April, 1980 to December, 1982, and falling profits in 1981 and 1982.¹¹ In addition, the industry experienced an

in terms of units.

⁷ See *infra* notes 39-42 and accompanying text (Petition by National Machine Tool Builders' Association under the Trade Expansion Act of 1962); *infra* notes 43-47 and accompanying text (Petition by Cincinnati Milicron under the Trade Expansion Act of 1962); *infra* notes 48-51 and accompanying text (Petition by Houdaille Industries under the Revenue Act of 1971).

⁸ For example, antidumping duties may be imposed where injury is caused or threatened by the sale of foreign merchandise in the United States at less than its fair value, 19 U.S.C. § 1673 (Supp. V 1981), or countervailing duties may be imposed where injury is caused or threatened by imports which have been subsidized. 19 U.S.C. § 1671 (Supp. V 1981).

⁹ 19 U.S.C. § 2251 (1976).

¹⁰ *Id.* at § 1862.

¹¹ National Machine Tool Builders' Association, Petition to the U.S. Department of Commerce Under the National Security Clause, Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862), for Adjustment of Imports of Machine Tools 106-114 (Mar. 10, 1983) [hereinafter cited as National Machine Tool].

all-time low capacity utilization rate in January 1983.¹²

In order to qualify for protection under the various trade related statutes, an industry must establish that imports are a causative factor of the industry's injury. Section 201 of the Trade Act of 1974,¹³ commonly known as the "escape clause," provides that the U.S. International Trade Commission (USITC), when requested, "shall promptly make an investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."¹⁴ The machine tool industry has not currently filed a petition under section 201 of the Trade Act of 1974. However, a previous determination involving the U.S. automobile industry is instructive in examining the level of injury required for a favorable finding by the USITC.¹⁵ The USITC conducted an investigation pursuant to receipt of a petition for import relief filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) on June 12, 1980, and it issued its determination on December 3, 1980.¹⁶ Data compiled by the USITC during its investigation revealed that the ratio of imported passenger cars to domestic consumption increased from 25.1 percent in 1978 to 35.8 percent in the first six months of 1980.¹⁷ Domestic car shipments decreased from 1978 to 1979.¹⁸ In the first six months of 1980, domestic shipments fell by over two million automobiles,¹⁹ while imports continued to rise both in absolute terms and as a percentage of total U.S. auto consumption.²⁰ In its determination, issued under section 201 of the Trade Act of 1974, the Commissioners were not required to determine the nature or source of the injury.²¹ Thus, even though Japan was the major exporter to the U.S. market and increased its share of imports from 13.0 percent of domestic consumption in 1978 to 22.5 percent in the first six months of 1980,²² the USITC looked to the aggregate level of imports in making its determination on the two basic elements of the "escape clause" provision.

¹² *Id.*

¹³ 19 U.S.C. § 2251(b) (1976).

¹⁴ *Id.*

¹⁵ U.S. INT'L TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-44, CERTAIN MOTOR VEHICLES AND CERTAIN CHASIS AND BODIES THEREFOR, U.S.I.T.C. Pub. No. 1110 (Dec. 3, 1980)[hereinafter cited as INVESTIGATIONS].

¹⁶ *Id.*

¹⁷ *Id.* at A-48.

¹⁸ *Id.*

¹⁹ *Id.* at A-43.

²⁰ *Id.* at 169.

²¹ 19 U.S.C. § 2251(b) (1976).

²² INVESTIGATIONS, *supra* note 15, at A-23.

The first element to be determined is serious injury. "Section 201(b)(2) of the Trade Act requires that the Commission shall take into account all economic factors which it considers relevant, including (but not limited to) . . . the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment" ²³ The Commissioners were in general agreement that this first element had been satisfied and that injury had occurred to the domestic automobile industry. ²⁴ As for the second element, the Trade Act defines "substantial cause" as a cause which is important and not less than any other cause. ²⁵ Commissioner Calhoun, in examining the changes in this causality standard as written into the Trade Act of 1974, determined that the committee reports clearly indicated a desire to create a more liberal test of injury by replacing "major cause" with "substantial cause." ²⁶ However, a majority of the Commissioners, including Commissioner Calhoun, rejected the petition, relying on an aggregation of factors such as high interest rates, high gasoline prices and high unemployment, rather than imports, in order to explain the cause of the injury. In the words of Commissioner Alberger:

I do not find that increased imports are a substantial cause of such injury I have found the decline in demand for new automobiles and light trucks owing to the general recessionary conditions in the United States economy to be a far greater cause of the domestic industries' plight than the increase in imports. ²⁷

Commissioners Bedell and Moore dissented, concluding that all conditions for an affirmative finding had been met. These two Commissioners explained that section 201 required the USITC to weigh each factor individually in making a determination of injury. ²⁸ The recession should be viewed in terms of the component elements creating the economic decline. The dissenters reported:

As the legislative history of section 201 suggests, it is not feasible to assign a number on a scale of 1 to 10 to each of the causes of serious injury and thereby discover which is the most important cause. On the other hand, it is consistent with the legislative intent to examine each individual cause to determine which one, if absent, would have had the greatest effect of alleviating the serious injury experienced by the domestic industry. On that basis the most important cause of serious injury to the do-

²³ *Id.* at 16.

²⁴ *Id.* at 34-36, 92, 119, 169-75.

²⁵ 19 U.S.C. § 2251(b)(4) (1976).

²⁶ INVESTIGATIONS, *supra* note 15, at 67.

²⁷ *Id.* at 21.

²⁸ *Id.* at 172-73.

mestic automobile industry is increasing imports of on-the-highway passenger automobiles.²⁹

Thus, for the automobile industry, the legal questions of whether import relief could be provided under section 201 of the Trade Act of 1974 was resolved with the USITC's negative determination on December 3, 1980.³⁰

However, a political remedy was forthcoming on April 1, 1981 when, after discussions with the U.S. government, the Japanese government undertook a "voluntary restraint program" whereby a quota on exports of automobiles to the U.S. market was established.³¹ As domestic automobile production continued to fall in 1981 and 1982,³² the Japanese government maintained the quota at the same level through March 31, 1984.³³ On November 1, 1983, the government of Japan announced that it would undertake an additional twelve months of a "voluntary restraint program" on automobile exports to the United States but at a level slightly more than ten percent higher than the quota established for the previous three years.³⁴

An alternative method of addressing the problem, one which has significant ramifications, is currently being pursued through legislative channels in the form of "domestic content" legislation.³⁵ The intent of this

²⁹ *Id* at 177.

³⁰ See *supra* notes 16-23 and accompanying text.

³¹ N.Y. Times, Nov. 2, 1983, at D1; Washington Post, Nov. 2, 1983, at D7. See generally Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y IN INT'L BUS. 747-817 (1982).

³² The production level in 1982 of just over five million was the lowest since 1958. 1983 WARD'S AUTOMOTIVE YEARBOOK 80-81.

³³ See *supra* note 31. A resolution was introduced in the U.S. Senate on Oct. 27, 1983 whereby it would be resolved with the concurrence of the House of Representatives:

That it is the sense of the Congress that in order to reduce high unemployment in the United States automobile industry, to foster the recovery of United States automobile production, and to avoid the United States trade situation from further deteriorating, the President and his representatives should urge the Japanese to extend the voluntary automobile export limits beyond March 31, 1984, at the present level without any exceptions.

S. Con. Res. 81, 98th Cong., 1st Sess. (1983) (the resolution was referred to the Senate Committee on Finance and no action has been reported through Jan. 17, 1984).

³⁴ See *supra* note 31. The Japanese announcement coincided with scheduled consideration by the House of Representatives of H.R. 1234, the "domestic content" bill, see *infra* note 35. The House Trade Subcommittee staff director noted that the announcement definitely helps the opponents of the bill which "[w]e now have a very good chance of beating." N.Y. Times, Nov. 2, 1983, at D2.

³⁵ H.R. 1234, 98th Cong., 1st Sess. (1983) (passed the House of Representatives on Nov. 3, 1983; received in the Senate and referred to the Committee on Commerce, Science and Transportation on Nov. 7, 1983). It was reported that H.R. 1234 is unlikely to pass the Senate, and that, if it does, the President would likely veto it. N.Y. Times, Nov. 4, 1983, at A1.

legislation is to require foreign producers of automobiles to produce automobiles with a certain percentage of U.S. content in order to sell to the U.S. market.³⁶

Perhaps in light of the adverse determination by the USITC in the case of the automobile industry, the machine tool industry and its members have chosen not to seek relief under section 201 of the Trade Act of 1974 in seeking a legal remedy for the impact of imports. Even if the machine tool industry had petitioned under section 201 and even if the USITC had found injury, it still remains for the President to "determine what method and amount of import relief he will provide, or determine that the provision of such relief is not in the national economic interest of the United States."³⁷

The National Machine Tool Builders Association (NMTBA) and its members have chosen to pursue legal channels with specific detailed remedies. First, the NMTBA in March, 1983 filed a petition³⁸ with the Department of Commerce under the National Security Clause of the Trade Expansion Act of 1962.³⁹ The petition states:⁴⁰

[Relief is sought] in the form of quotas upon metal-cutting and metal-forming machine tools imported into the United States. More specifically, NMTBA requests a five-year regime of quotas limiting imports in each of the two broad sectors of machine tools, as follows:

Sector	<i>Annual Limit on Imports (Percentage of Total Domestic Consumption by Value)</i>
Metal-Cutting Machine Tools	17.5%
Metal-Forming Machine Tools	17.5%

The NMTBA filed the petition on the basis of the machine tool industry's critical role in U.S. industry and its indispensability both in preparing for war and during wartime conditions. They argued that:

In light of the unique showing required to establish a basis for relief under the National Security Clause, it is appropriate to set forth, at the outset, precisely what [the] NMTBA is required to show, and what it is *not* required to show, to qualify for such relief. The Clause reads in

³⁶ *Id.*

³⁷ 19 U.S.C. § 2252(b)(1) (1976). "Out of 48 section 201 cases completed since 1974, only 11 have resulted in import relief and in only one of those has the President approved what the International Trade Commission recommended." 129 CONG. REC. S16965 (daily ed. Nov. 18, 1983).

³⁸ National Machine Tool, *supra* note 11.

³⁹ 19 U.S.C. § 1862 (1976).

⁴⁰ See National Machine Tool, *supra* note 11, at 1-2.

terms of *impairment*, not destruction, of the national security. Moreover, it is unnecessary to show that imports will certainly impair the national security; instead, a *threat* of such impairment is sufficient. Finally, Congress has *not* required that [the] NMTBA show that imports *caused* the present depression of the United States machine tool industry. Instead, the Clause requires only a determination that, in the circumstances of that depression and its aftermath, imports of foreign-made machine tools threaten to impair the national security.⁴¹

The NMTBA argues that if the role of the machine tool industry is accepted as a critical one in terms of national security and if the level of imports in light of economic conditions and the state of the industry threatens that role, then a remedy should be provided. Therefore, the NMTBA claims there is no necessity of establishing the degree of injury due to import penetration. Rather, a sufficiently depressed domestic market may be vulnerable to almost any level of imports.

However, in pursuing a remedy under the National Security Clause and requesting quotas for machine tools significantly below the current level of imports, the NMTBA went beyond the issue of National Security and addressed the viability of the domestic industry and the existence of specific import challenges. They stated that "[i]t is clear . . . that imports of machine tools are threatening the domestic industry's ability and incentive to preserve and expand its production base and to continue its leadership in high technology research and development."⁴²

In developing the argument of present and continuing injury to the domestic machine tool industry from imports, the NMTBA utilized a study on the competitiveness of the domestic machine tool industry which was used as a petition to the USITC by one of its members, Cincinnati Milicron.⁴³ In *Computer-Aided Manufacturing: The Japanese Challenge*,⁴⁴ Cincinnati Milicron presented its case against the Japanese threat to the high-technology growth sector of the machine tool industry. Cincinnati Milicron argued that the U.S. industry has been damaged by imports, citing association data that 97 percent of all imported Japanese machining centers were sophisticated NC machining centers⁴⁵ and that imported Japanese NC machining centers grew from 2 percent of the

⁴¹ *Id.* at 60.

⁴² *Id.* at 10.

⁴³ This investigation was self-initiated by the ITC under section 332 of the Tariff Act of 1930. It will issue its findings on the international competitiveness of the U.S. machine tool industry but will issue no recommendation. 19 U.S.C. § 1332 (1976).

⁴⁴ Cincinnati Milacron, *Computer-Aided Manufacturing: The Japanese Challenge*, Comments Submitted to the U.S. Int'l Trade Commission in Investigation No. 332-149 (Dec. 14, 1982).

⁴⁵ *Id.* Appendix 5 at 16.

market in 1979 to 53 percent of the market in 1981.⁴⁶ Further, it argued that this injury has resulted in part by direct actions of the Japanese government in assisting its machine tool industry, and that the government assistance, according to Cincinnati Milicron, has resulted in the Japanese gaining a larger share of the world market for machine tools than if the industry had been operating without such assistance. "Spurred on by their Government, the Japanese manufacturers of computer controlled robots and machine tools are already swamping the markets in this country and . . . have captured *more than half* of the market that exists in the United States for technologically sophisticated computer-aided manufacturing equipment."⁴⁷ Thus, it was argued that injury results from a high level of imports into the recessionary U.S. economy, as well as from direct actions of the Japanese government as the result of its policies to strengthen and develop its own machine tool industry.

The scope of the request for import relief of Cincinnati Milicron was further expanded by Houdaille Industries, Inc. when it presented its petition⁴⁸ to the President on May 3, 1982, asking for legal redress under section 103 of the Revenue Act of 1971.⁴⁹ Under section 103, the President may suspend the 10 percent investment tax credit on products from a foreign country upon a determination that the foreign country engages in unfair trade practices.⁵⁰ The action by Houdaille was based on the contention that more has occurred than merely import injury to the domestic industry, and that more than casual government assistance has been provided to the Japanese machine tool industry. Houdaille argued that it "has uncovered conclusive evidence that the Japanese government instigated the formation of . . . [a] cartel and continues to shield its members from competition."⁵¹ Section 103 of the Revenue Act has not previously been utilized to restrain imports. The Houdaille petition fills two volumes with 600 pages of text, tables, graphs and original source documents in both Japanese and English.

The petition addresses the methods that the Japanese government and its Ministry of International Trade and Industry (MITI) have utilized to target the Japanese machine tool industry as a high growth and export industry. Houdaille maintains that the laws passed by the Japanese government have had the result of shielding the industry from anti-monopoly scrutiny in the areas of rationalization and concentration of

⁴⁶ *Id.* Appendix 5 at 17.

⁴⁷ *Id.* at 2.

⁴⁸ See Houdaille Industries, Inc., *supra* note 6.

⁴⁹ 26 U.S.C. § 48(a)(7)(D) (1976).

⁵⁰ *Id.*

⁵¹ Houdaille Industries, Inc., *supra* note 6, at 1-2.

production, price agreements and government subsidies.⁵² In its initial support of machine tool industry development, MITI was able to strengthen the market position of firms in the industry under its guidelines which provide that any firm "whose production of a particular machine tool was less than 5 percent of the Japanese market in that tool and less than 20 percent of the company's total production was directed to stop manufacturing these tools."⁵³ Further evidence of the Japanese government's active development of a cartel to assist in targeting the machine tool industry for growth are concessionary loans and subsidies. These subsidies in the form of "[m]illions of dollars worth of yen generated by wagering on bicycle and motorcycle races in Japan were funnelled into export industries, including the machine-tool cartel."⁵⁴

The actions by the Japanese government were not a recent phenomenon, but have evolved over a period of three decades, beginning in 1956, when the first of a series of laws were implemented to assist the machine tool industry. These laws, known as the First, Second and Third Extraordinary Measures Laws,⁵⁵ were intended to establish "the groundwork for concentrating and promoting the Japanese machinery industry."⁵⁶ The Second Extraordinary Measure was "aimed at promoting certain designated machinery industries by improving 'production techniques and rationalization of production' . . . [and] contained a specific commitment of financial assistance."⁵⁷ The Third Extraordinary Measure, which is due to expire in 1985, "entrusts MITI with establishing an 'Elevation Plan' for enterprises that manufacture certain machines grouped in three subcategories. Cabinet Order No. 342 of September 29, 1978, has specified that each of these three subcategories includes [n]umerically controlled metal cutting machine tools."⁵⁸ The effect has been to allow the Japanese machine tool industry to develop without the constraints of monopoly and antitrust law.⁵⁹

IV. THE SCOPE OF PRESIDENTIAL AUTHORITY UNDER SECTION 103

The Houdaille Petition was submitted to the President through the Office of the United States Trade Representative, which then referred it

⁵² *Id.* at 4-9.

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 55.

⁵⁶ *Id.*

⁵⁷ *Id.* at 77.

⁵⁸ *Id.* at 81-82.

⁵⁹ See also REPORT BY THE COMPTROLLER GENERAL TO THE CHAIRMAN OF THE JOINT ECONOMIC COMMITTEE UNITED STATES CONGRESS, INDUSTRIAL POLICY: JAPAN'S FLEXIBLE APPROACH, GAO/ID-82-32, at 50 (June 23, 1982).

to an interagency task force for analysis.⁶⁰ The task force received written comments opposing the petition from Japanese trade associations.⁶¹ Among other things, the task force considered whether section 103 of the Revenue Act of 1971 authorizes the President to act only in response to foreign import restrictions which affect the export trade of the United States.⁶² The following analysis concludes that such a restrictive interpretation of section 103 does not reflect Congressional intent and finds that the President has the authority to grant the relief sought by Houdaille Industries.

Section 103 provides that if the President determines that a foreign country either: "(i) maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or (ii) engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce," he may provide by Executive Order that the products of such foreign country are ineligible for the investment tax credit.⁶³ In order to assess the merit of the contention that section 103 does not provide authority for the President to suspend the investment tax credit in response to actions or policies of a foreign government or instrumentality which unjustifiably restrict the *domestic* economy of the United States, it is necessary to consider the extent of Presidential authority as it existed under section 252(b) of the Trade Expansion Act of 1962.⁶⁴

⁶⁰ In processing the Houdaille Petition, the Office of the U.S. Trade Representative apparently adopted the procedures established for petitions under section 301 of the Trade Act of 1974, as amended 19 U.S.C. § 2411 (1976), and the regulations pertaining thereto. 15 C.F.R. §§ 2006.0-2006.15 (1982).

⁶¹ Japan Machine Tool Builders' Association, Japan Metal Forming Machine Builders' Association, and Japan Machinery Exporters' Association, Comments in Opposition to the Houdaille Petition (July 29, 1982, Aug. 31, 1982).

⁶² 26 U.S.C. § 48(a)(7)(D) (1976).

⁶³ *Id.*

⁶⁴ The extent of Presidential authority under section 103 of the Revenue Act of 1971 is the same as that which existed under section 252(b) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 879 (1962), replaced by section 301 of the Trade Act of 1974, as amended 19 U.S.C. § 2411 (1976), because (1) language describing the acts or policies for which sanctions may be imposed under section 103 was drawn verbatim from section 252(b); and (2) the Conference Report concerning the Revenue Act of 1971 explicitly states "[t]he trade restrictions are the same as those contained in section 252(b) of the Trade Expansion Act of 1962." CONF. REP. NO. 178, 92d Cong., 1st Sess., reprinted in 1971 U.S. CODE CONG. & AD. NEWS 2055-56.

Section 252(b) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 879 (1962), provides:

(b) Whenever a foreign country or instrumentality the products of which receive benefits of trade agreement concessions made by the United States—

(1) maintains nontariff trade restrictions, including variable import fees,

It is a settled matter of our law and practice that a statutory term is to be understood by the plain and obvious meaning of the words employed.⁶⁵ To argue that the President was authorized to respond, under section 252(b), only to acts or policies unjustifiably restricting the foreign trade of the United States, one must interpret the term "United States commerce" in a manner unwarranted not only by the provision's plain meaning but also by reference to the Constitution and laws of the United States. The Constitution clearly divides the power of Congress to regulate commerce into categories which include both foreign and domestic trade.⁶⁶ When Congress, without expressed or implied qualification, delegates authority to the President to act regarding the commerce of the United States, such authority should be interpreted to extend to both foreign and domestic aspects of U.S. commerce.

In other provisions of the Trade Expansion Act of 1962, Congress differentiated between domestic and foreign commerce. Under section 201, for example, the President is authorized to enter into trade agreements when he determines that any existing duties or other import restrictions are "unduly burdening and restricting the foreign trade of the United States."⁶⁷ More importantly, Congress indicated in section 102(1) that one purpose of the Act was "to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining and commerce."⁶⁸ The foregoing provisions make it quite plain that Congress intended the Trade Expansion Act to apply to all aspects of U.S. commerce, and that a distinction between foreign and domestic markets be made whenever it was intended to limit the application of a particular section of the Act to a segment of U.S. commerce.

The plain and natural meaning of the statutory language of section 252(b) does not support a construction of Presidential authority which is limited only to foreign acts or policies restricting U.S. exports. Moreover, the heading of section 252, "Foreign Import Restrictions," cannot be con-

which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or

(2) engages in discriminatory or other acts (including tolerance of international cartel(s) or policies unjustifiably restricting United States commerce), the President shall, to the extent that such action is consistent with the purposes of section 102—

(A) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(B) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

⁶⁵ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819).

⁶⁶ U.S. CONST. art. I, § 8, cl. 3.

⁶⁷ 19 U.S.C. § 1821(a) (1976).

⁶⁸ *Id.* § 1801(1) (emphasis added).

strued to qualify the acts or policies mentioned in section 252(b) since, in the absence of textual ambiguity, "the title of a statute and the heading of a section cannot limit the plain meaning of the text."⁶⁹ The restrictive interpretation of section 252(b) is further undermined by the fact that section 252(c) applies to situations where the unreasonable import restrictions of one foreign country divert the exports of another country into the domestic market of the United States and thereby create a substantial burden on U.S. commerce. As Senator Bush stated in floor debate:

This committee amendment [Section 252(c)] authorizes, but does not require, the President to suspend past concessions, and to refrain from granting new concessions to countries whose import restrictions burden our commerce. The provision is worded so that the failure of another country to extend the benefit of its concessions on a most-favored-nation basis to Japan and other low-wage countries would permit the President to act against that country, since its failure would force Japan's exports unnaturally into the United States.⁷⁰

An expansive interpretation of Presidential authority under section 252(b) is further supported by reference to an earlier version of that section. The section-by-section analysis of the Trade Expansion Act of 1962 as submitted to Congress by the Executive Branch elaborates upon the Administration's version of section 252(b) in the following manner:

Section 242. Suspension of Benefits.

This section is substantially identical to the proviso of section 350(a)(5) of the Trade Agreements Act of 1934, as amended [Tariff Act of 1930]. It provides that the President shall, when he determines that the purposes of the act will be promoted thereby, suspend the reduction or elimination of any duty or other import restriction provided in any proclamation issued in carrying out any trade agreement under Title II or any prior trade agreements act, to products of any foreign country which (1) engages in discriminatory treatment of U.S. commerce or (2) engages in other acts, including the operation of international cartels, or policies which in the President's opinion tend to defeat such purposes.⁷¹

The United States Tariff Commission (now known as the USITC), also submitted an analysis of H.R. 9900 and noted, in discussing section 242, that: "This provision is derived from the proviso to existing section

⁶⁹ *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 528, 529 (1947).

⁷⁰ 108 CONG. REC. 19,825 (1962) (remarks of Sen. Bush), *reprinted in* HOUSE COMM. ON WAYS AND MEANS, 90TH CONG., 1ST SESS., 2 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 1764-65 (1967).

⁷¹ Section-by-section analysis as prepared by the Executive Branch to accompany H.R. 9900, 87th Cong., 2d Sess. (1962), *reprinted in* 1 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 118 (1967).

350(a)(5) of the Tariff Act."⁷² Both the section-by-section analysis and the Tariff Commission memorandum state that the President shall take action against the act(s) or policies of a foreign country which, in his opinion, defeat the purposes of the act. One purpose of the act is to stimulate the domestic economic growth of the United States.⁷³

Contrasting Presidential authority under section 252(b) with such authority as it existed under the predecessor statute⁷⁴ provides further support for a broad interpretation of section 252(b). An examination of section 350(a)(5) of the Tariff Act of 1930⁷⁵ reveals that the language of the proviso is substantially similar to draft section 242 as proposed by the Administration,⁷⁶ as well as to section 252(b) as enacted.⁷⁷ However, there is a critical difference which demonstrates the enlargement of Presidential authority under the Trade Expansion Act of 1962.

Section 350(a)(1) of the Tariff Act of 1930 authorizes the President, "[f]or the purpose of expanding foreign markets for the products of the United States," to proclaim appropriate modifications of duties and other import restrictions in order to carry out authorized trade agreements.⁷⁸ Section 350(a)(5) provided that such proclaimed modifications were to apply to the articles of all foreign countries subject, inter alia, to the following proviso:

That the President shall, as soon as practicable, suspend the application [of modifications] to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion *tend to defeat the purpose of this section*.⁷⁹

It is clear that by this language Congress directed the President to suspend proclaimed benefits regarding the products of a foreign country whenever, in his opinion, the acts or policies of such country prevented the expansion of foreign markets for products of the United States.

In determining whether the President's authority under section 252(b) of the Trade Expansion Act extended to both foreign and domestic commerce, it is clear that the predecessor statute was limited in pur-

⁷² U.S. TARIFF COMM'N, MEMORANDUM ON H.R. 9900 OF THE 87TH CONG., THE TRADE EXPANSION ACT OF 1962, at 20 (Apr. 9, 1962), reprinted in 1 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 750 (1967).

⁷³ 19 U.S.C. § 1801 (1976).

⁷⁴ Tariff Act of 1930, ch. 497, 46 Stat. 590, 672 (1930).

⁷⁵ *Id.*

⁷⁶ 1 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 98, 118 (1976).

⁷⁷ Pub. L. No. 87-794, 77 Stat. 879 (1962); *supra* note 64.

⁷⁸ 19 U.S.C. § 1351(a)(1) (1976) (emphasis added).

⁷⁹ Pub. L. No. 86, 69 Stat. 162, 164 (1955) (emphasis added).

pose to expanding foreign markets, while the *raison d'être* of the Trade Expansion Act was deliberately broadened to include the purpose of expanding the domestic economy of the United States.⁸⁰ If promoting domestic economic growth was not a purpose of the Trade Expansion Act, the argument that Presidential authority under section 252(b) was restricted to foreign trade would have more force. The existence of that purpose confirms that section 252(b) should be construed according to the plain and natural meaning of its terms, and that the President was authorized thereunder to take action against foreign acts or policies unjustifiably restricting the domestic or foreign commerce of the United States.

This conclusion is supported by reference to a decision of the United States Court of Customs and Patent Appeals which was rendered prior to the enactment of the Trade Expansion Act. In *Star-Kist Foods v. United States*,⁸¹ the court compared the powers delegated to the President under section 350(a) of the Tariff Act of 1930 with the powers delegated under earlier tariff acts.⁸² According to the court, both the scope and constitutionality of such delegations of authority are determined by the existence of a stated Congressional purpose in furtherance of which Presidential action may be invoked, and by the existence of a standard sufficient to indicate when action by the President is appropriate.⁸³

The court in *Star-Kist* clearly defined the extent of Presidential authority under the proviso of section 350(a)(5) in terms of the stated Congressional purpose of promoting the foreign trade of the United States.⁸⁴ If the reasoning of the court is applied to the issue of Presidential authority under section 252(b) of the Trade Expansion Act, the conclusion is inescapable that the President thereby possessed authority to act regarding both domestic and foreign commerce.

When unfair trade practices were mentioned during floor debates concerning section 252 of the Trade Expansion Act, the reference was usually to foreign acts or policies that restricted U.S. exports.⁸⁵ However, unfair trade practices were not exclusively related to U.S. exports during the floor debates.⁸⁶ Furthermore, even though there is no statement in the

⁸⁰ Section 102(1) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962) (codified at 19 U.S.C. § 1801(1) (1976)).

⁸¹ 275 F.2d 472 (C.C.P.A. 1959).

⁸² *Id.* at 480-481.

⁸³ *Id.* at 480.

⁸⁴ *Id.* at 480-482.

⁸⁵ *Supra* note 70.

⁸⁶ *Id.* Additionally, in the Senate floor debate both on the House bill and Conference Report, section 252 was discussed as providing a remedy for domestic injury to the U.S. lumber industry which had the effect of increasing exports to the United States. See generally the discussions concerning potential remedies under the act for Canadian lumber subsi-

debates which establishes the extent of Presidential authority to take action in response to a restriction of the domestic economy pursuant to the Revenue Act or to the Trade Expansion Act, the U.S. Senate recently agreed in a Senate resolution that the President has, and should exercise, authority under section 103 of the Revenue Act of 1971 to grant the relief requested by Houdaille Industries.⁸⁷

dies which invariably included reference to section 252(b). 108 CONG. REC. 19,807-12, 22,181-88 (1962), *reprinted in* 2 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 1731-38, 2026-37 (1967). See also the debate regarding a proposed amendment to section 252(b), the purpose of which was to authorize the President to use the trade power given him under the bill for the purpose of conserving fishery resources. According to Senator Bartlett:

The approach employed by the amendment is direct. It amends section 252(b) of the bill by adding two conditions under which the President may suspend trade concessions granted other nations. The amendment would permit the President after public hearing and within his own discretion to withhold trade concessions if he determines that a country is engaged in practices which tend to defeat our efforts to conserve fishery resources or if he determines a country is taking any action contrary to the principles of international law to harass U.S. fishing vessels on the high seas . . . [W]e pointed out that the amendment is consistent with the purposes of the bill . . . We stated that the amendment is consistent also with the organizational structure provided by the bill, in which wide discretion is given the President to solve these complex and interrelated problems. A broad range of economic responses must be available to the President, so he can tailor the remedy to meet situations involving any particular country at any time in the future.

108 CONG. REC. 19,782-83 (1962), *reprinted in* 2 LEGISLATIVE HISTORY OF THE TRADE EXPANSION ACT OF 1962, at 1690-91 (1967).

⁸⁷ S. Res. 525, 97th Cong., 2d Sess., 128 CONG. REC. S15,962 (daily ed. Dec. 21, 1982).

The text of Senate Resolution 525 is as follows:

Whereas the Government of Japan has selected the United States high-technology industry in numerically-controlled machine tools for domination through unfair trade practices; and

Whereas the Petition to the President submitted by Houdaille Industries, Inc., on May 2, 1982, thoroughly documents continuing anticompetitive cartel policies and practices, including the financing of a machine-tool cartel with multi-billion dollar off-budget subsidies earned from bicycle and motorcycle-race wagering, employed by the Government of Japan to further its industry-targeting goals; and

Whereas as a consequence of the discriminatory acts and policies of the Government of Japan, including its tolerance of an international machine-tool cartel, the Government of Japan has unjustifiably restricted United States commerce in numerically-controlled machining centers and punching machines: Now therefore, be it resolved.

Resolved, That it is the sense of the Senate that the President of the United States should exercise immediately his authority under Section 103 of the Revenue Act of 1971, 26 U.S.C. 48(a)(7)(D), to issue an Executive Order disqualifying Japanese-manufactured, numerically-controlled machining centers and punching machines from the United States investment tax credit until the Government of Japan provides persuasive evidence to the President of the United States that these and other unfair and discriminatory acts and policies unjustifiably restrict-

In a case involving the extent of congressionally delegated authority where the legislative history was contradictory, the Supreme Court has stated: "Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."⁸⁸ The legislative histories regarding the extent of authority delegated to the President under section 252(b) of the Trade Expansion Act and section 103 of the Revenue Act are not ambiguous because they are contradictory, but because they are non-existent. Under such circumstances, the scope of Presidential authority is to be determined by the statutory language itself. Neither the plain language of the Trade Expansion Act nor the Revenue Act nor the legislative antecedents of sections 103 and 252(b) warrant an interpretation which limits Presidential authority only to foreign acts or policies restricting U.S. exports.⁸⁹

V. PROSPECTS AND POLICY OPTIONS

The United States and Japan are two powerful economic entities that are allies as well as major trading partners. While both economies operate on the basis of a free market system, there is a basic difference in the philosophic outlook that provides the framework for the respective economies. The U.S. economy has operated on a laissez-faire system under which firms compete in the open market for access to capital and customers. Firms which feel they have been denied free access to the market can petition the government for redress.

On the other hand, the Japanese government has carefully planned, nurtured and guided major segments of its economy as a result of the scarcity of many raw materials and the devastation of its industrial economy during the Second World War. The Japanese government has instituted policies which have encouraged or assisted its domestic industries in selling to a world-wide market, thus causing problems not only in the United States, but in other industrial countries as well. The resulting disruption to major U.S. industries in such areas as automobiles, steel and machine tools has challenged the validity of basic tenets of our economic system. The following assumptions may no longer be valid: (1) that the size and versatility of the U.S. economy would shield it from any competition from imports; (2) that domestic manufacturers could concentrate almost exclusively on the domestic market while the export market re-

ing United States commerce have ceased.

⁸⁸ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971).

⁸⁹ After "eleven months of intense and often acrimonious debate" at the sub-cabinet and Cabinet level, a set of "agreed facts" was prepared which "supported much of the Houdaille legal complaint." The issue was submitted to the President who, on April 22, 1983, determined not to exercise his discretionary authority to grant the relief sought by Houdaille Industries. *Washington Post*, Aug. 15, 1983, at A1, A4.

mained a secondary consideration; and, (3) that the development and marketing of the most sophisticated, capital intensive products can be accomplished without any cooperation among firms, or direct involvement by the government.

The options available for facing the competition from imports appear to be threefold. The first option is to take no action at all and allow the market to allocate the production and consumption freely without governmental interference. This would appear to be politically unacceptable since it fails to address the severe dislocations affecting major segments of the U.S. economy which are most affected by imports. The second option is to continue the attempt to find relief through the pursuit of legal action such as the petitions outlined under the Trade Act of 1974 or the Revenue Act of 1971.⁹⁰ These remedies would restrain, curb or moderate the inflow of imports for a given period of time. However, the remedies do nothing to encourage the development of new markets, to assist in the improvement of old products or to facilitate the introduction of new ones. The third option is for management, labor and government in the United States to recognize that profound changes are occurring in the global market place which are directly affecting the U.S. economy. The magnitude of these changes is far more drastic than those that have occurred in the recent past, and it must be recognized that there is currently no mechanism in the United States that is capable of responding to these changes.

While U.S. military policy attempts to anticipate and provide for every possible strategic threat, U.S. economic policy continues to operate on the premise that the industrial sector of the U.S. economy will self-adjust to any threat which it faces. The fact is that the U.S. economy is maturing; the exponential growth of high paying jobs which were generated during the past decades will not continue. At the same time the development of a sophisticated high growth industrial policy by the Japanese has increased competition for markets both in the United States and worldwide.

Therefore, a long range solution to the import threat and to the changing U.S. economy requires a different approach from the current dispersion of trade authority throughout a myriad of government agencies and interagency councils. What may be required is the formation of a new department similar to Japan's Ministry of International Trade and Industry (MITI). This department would monitor and encourage the development of capital intensive, high technology, high growth industries and ex-

⁹⁰ See *supra* notes 16-30 and accompanying text (UAW petition under the Trade Act of 1974); *supra* notes 48-51 and accompanying text (Houdaille Industries' petition under the Revenue Act of 1971).

amine the various needs of older industries in adapting to import competition and changing technology.

